NO. 35268-4-III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

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STATE OF WASHINGTON,
Respondent,

v.

ROBERT TALLY,
Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR SPOKANE COUNTY

Spokane County Cause No. 15-1-03751-1

The Honorable Raymond F. Clary, Judge

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# BRIEF OF APPELLANT

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ERIN SPERGER, WSBA NO. 45931
LISE ELLNER, WSBA NO. 20955
Attorneys for Appellant

LAW OFFICES OF LISE ELLNER
Post Office Box 2711
Vashon, WA 98070
(206) 504-2655

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**RULES, STATUTES, AND OTHERS, continued**

A. ASSIGNMENTS OF ERROR

1. Tally's constitutional right to effective assistance of counsel was violated when defense counsel failed to pursue a defense of diminished capacity.

2. Tally's constitutional right to effective assistance of counsel was violated when defense counsel failed to submit expert testimony to support his affirmative defense of self-defense.

3. The trial court erred by giving instruction number 19, which reads:

> No person may, by an intentional act reasonably likely to provoke a belligerent response, create a necessity for acting in self-defense and thereupon use, offer, or attempt to use force upon or toward another person. Therefore, if you find beyond a reasonable doubt that the defendant was the aggressor, and that defendant's acts and conduct provoked or commenced the fight, then self-defense is not available as a defense.

Issues Presented on Appeal

1. Was defense counsel ineffective when he failed to pursue a defense of diminished capacity when Tally suffers from PTSD?

2. Was defense counsel ineffective when he failed to submit expert testimony to support his affirmative defense of self-defense?

3. Did the trial err by giving the "First Aggressor" Instruction (WPIC 16.04) which prevented Tally from arguing his self-defense

claim?

B. STATEMENT OF THE CASE

Robert Tally was charged and convicted by a jury of assault in the second degree. CP 1, 114. On August 11, 2015, Tally attended a hearing at the juvenile court in Spokane, where White and her current husband, Jaime White also attended. RP 98-99, 270. This incident arose during and following the dependency status hearing regarding Tally and his ex-wife, Sara White's, children. RP 95, 221, 270.

Tally suffers from PTSD. CP 23. However, the court granted the state's motion to suppress any reference to PTSD by Tally. RP 62, 64-65. Defense counsel argued Tally should be allowed to discuss his PTSD without an expert, arguing, "I think people are allowed to testify, I guess it's sort have [sic] along the lines of family history. Nobody knows when and where they were born. You obviously have been told by somebody that information and people are allowed to testify to that." RP 62, 64.

Defense counsel also argued in support of permitting Tally to present PTSD on the grounds that it was a diagnosis made during the course of counseling or medical diagnosis. RP 62-63. Finally, defense counsel explained that Tally's description of his symptoms and

management of those symptoms would convey to the jury that he suffers from PTSD, thus Tally should be allowed to refer to his diagnosis to avoid confusion. RP 63. Defense counsel did not request expert testimony on PTSD. Instead, Tally's theory of the case was self-defense. CP 146. The defense expressly disavowed an insanity or diminished capacity defense. CP 23.

Although Tally was precluded by the court from testifying about his PTSD diagnosis, he did testify that he experiences nightmares, anxiety, irregulated emotions, animated behavior, and rapid speech. RP 273. Tally experienced a trigger to his PTSD during the August 11, 2015 dependency hearing and became agitated. RP 272-73.

Three times Tally asked the court to leave the court room to calm himself down. The court denied each request. RP 272-73. The jurors were aware of Tally being overly animated and some expressed fear to the judge. RP 417. When Tally was finally released from the hearing, he was so frantic to get outside that he lit his cigarette inside the building and he was talking to his girlfriend the whole way to the smoking section not realizing she was not there. RP 273-75. When he looked around for his girlfriend Matson, he saw White coming around the corner with something dangling from his left hand about 37

yards from Tally. RP 275. The two men walked toward each other with an intense eye gaze until they were a foot apart. RP 278.

It is undisputed that Tally struck White first, but the witness testimony is inconsistent about whether White first made an aggressive move or provoked Tally. RP 284. White testified he was hit from behind without provocation. RP 109-10, 113. Two bystanders, Hayley Jewell and Steve Hallstom also testified Tally struck White without provocation. RP 128-29, 134, 152.

However, Tally had some amateur training in Kajukenbo, which is a form of defense training. RP 280. Based on that experience and training in fighting, he understood that a person raises their shoulder just before the person throws a punch. RP 279-80. Tally testified that he was alarmed and on high alert when he saw White raise his right shoulder in a move that appeared to be White initiating a punch towards Tally. RP 278-80. The item in White's hand was a round bar that extended four inches from the bottom of White's hand. RP 287, 299. In response to this perceived threat, Tally grabbed White's shoulder and pushed him against a garage door. RP 279. As Tally walked away, White grabbed Tally. RP 283-84. Tally responded by striking White who hit his head on a curb. RP 268, 283-84.

Both bystanders were distracted and missed parts of the altercation. RP 133, 151, 157. Tally's girlfriend, Matson, was not distracted and witnessed the entire altercation. Matson witnessed White grab Tally's shoulder and witnessed Tally react by striking White. RP 267. White was treated at Deaconess Hospital for a nasal fracture. RP 102, 142-43.

Over defense objection, the court read the jury WPIC 16.04 which provides:

> No person may, by an intentional act reasonably likely to provoke a belligerent response, create a necessity for acting in self-defense and thereupon use, offer, or attempt to use force upon or toward another person. Therefore, if you find beyond a reasonable doubt that the defendant was the aggressor, and that defendant's acts and conduct provoked or commenced the fight, then self-defense is not available as a defense.

RP 319.

At the sentencing hearing, the court found mitigating circumstances under RCW 9.94A.535(1)(e) and imposed an exceptional sentence downward of 7 days in jail with seven days credit for time served, and 12 months of community custody. RP 416, 419. The court recognized that Tally's PTSD and mental health issues should have been introduced to the jury at trial. RP 420.

This timely appeal follows. CP 129-145.

C. ARGUMENT

1. TALLY WAS DENIED HIS CONSTITUTIONAL RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL, WHEN HIS ATTORNEY FAILED TO PURSUE A DIMINISHED CAPACITY DEFENSE.

Tally was denied his constitutional right to effective assistance of counsel by counsel's failure to: (1) present a diminished capacity defense; and (2) for failing to present expert testimony on PTSD.

The Sixth Amendment to the United States Constitution and Wash. Const. art. I, § 22 guarantee a criminal defendant the right to effective assistance of counsel. *State v. Grier*, 171 Wn.2d 17, 32, 246 P.3d 1260 (2011). The Court reviews ineffective assistance of counsel claims de novo. *State v. Wooten,* 178 Wn.2d 890, 895, 312 P.3d 41 (2013).

To prevail on an ineffective assistance of counsel claim, the defendant must show that defense counsel's representation was deficient and that the deficient representation prejudiced him. *Grier*, 171 Wn.2d at 32-33. Failure to establish either prong is fatal to an ineffective assistance of counsel claim. *Strickland v. Washington,* 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

Counsel's performance is deficient if it falls below an objective

standard of reasonableness, and there is "'a strong presumption that counsel's performance was reasonable.'" *Grier*, 171 Wn.2d at 33. (quoting *State v. Kyllo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009)).

To show prejudice, Tally must show a reasonable possibility that, but for counsel's purportedly deficient conduct, the outcome of the proceeding would have differed. *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004).

a. Failure to Present Diminished Capacity Defense.

In relevant part, assault in the second degree requires proof of the following elements:

> (1) A person is guilty of assault in the second degree if he or she, under circumstances not amounting to assault in the first degree:
>
> (a) Intentionally assaults another and thereby recklessly inflicts substantial bodily harm; or

RCW 9A.36.021.

The mental state for assault is intent. *Id*. Diminished capacity is a mental condition not amounting to insanity which prevents the defendant from possessing the requisite mental state necessary to commit the crime charged." *State v. Warden*, 133 Wn.2d 559, 564, 947 P.2d 707 (1997). When specific intent or knowledge is an element of the crime charged, a defendant is entitled to present

evidence showing an inability to form the specific intent or knowledge at the time of the crime. *State v. Edmon*, 28 Wn. App. 98, 102-04, 621 P.2d 1310 (1981).

A diminished capacity instruction is justified whenever the defendant presents sufficient evidence of a mental illness or disorder and the evidence logically connects the defendant's alleged mental condition with the inability to form the mental state necessary to commit the crime. *State v. Tilton,* 149 Wn.2d 775, 784, 72 P.3d 735 (2003). PTSD is generally accepted by the scientific and psychiatric communities as a condition that may result in the diminished capacity of the actor. *State v. Bottrell,* 103 Wn. App. 706, 716, 14 P.3d 164 (2000).

"Victims of chronic abuse suffer from a general psychological disorder known as post-traumatic stress disorder. PTSD is an anxiety-related disorder which occurs in response to traumatic events outside the normal range of human experience... One principal characteristic of the syndrome is hypervigilance." *State v. Janes*, 121 Wn.2d 220, 233, 850 P.2d 495 (1993) (citing Paul A. Mones, *When a Child Kills: Abused Children Who Kill Their Parents* 63 (1991)).

In discussing hypervigilance in the context of battered child

syndrome, the court recognized that a hypervigilant child "perceive[s] danger in subtle changes in the parent's expressions or mannerisms" causing him or her to constantly monitor the environment for subtle changes or signals which suggest danger is imminent. *Janes*, 121 Wn.2d at 234 (citing Steven R. Hicks, *Admissibility of Expert Testimony on the Psychology of the Battered Child*, 11 L. & Psychol. Rev. 103, 111 (1987)).

The defense must disclose pretrial, an intent to assert a diminished capacity defense because the defense "must obtain a corroborating expert opinion and disclose that evidence to the prosecution pretrial," giving the state a reasonable opportunity to decide whether to obtain its own evaluation "[d]epending on the strength of the defense's showing." *State v. Clark*, 187 Wn.2d 641, 651, 389 P.3d 462 (2017). (quoting, *State v. Atsbeha*, 142 Wn.2d 904, 907-08, 910-11, 16 P.3d 626 (2001) (citing CrR 4.7(b)(1), (b)(2)(viii))).

"Diminished capacity evidence is distinguished from observation testimony about relevant facts tending to rebut the State's mens rea evidence because diminished capacity requires an expert diagnosis of a mental disorder and expert opinion testimony

connecting the mental disorder to the defendant's inability to form a culpable mental state in a particular case." *Clark*, 187 Wn.2d at 651.

Here, defense counsel did not make a request for an expert and did not declare a diminished capacity defense. Rather defense counsel believed that allowing Tally to describe his experience would be sufficient to permit the jury to consider the defense. Tally suffers from PTSD and an expert would have explained this to the jury. CP 23. Prior to, and during the physical altercation, Tally experienced PTSD symptoms in the form of physical and emotional agitation beyond Tally's control. RP 272, 274, 277, 285. Tally described his PTSD reaction during the dependency hearing as feeling a frantic need to leave the court room to calm himself, and the court's refusal to allow Tally to leave which exacerbated Tally's feeling out of control RP 272, 292-93. The jury too witnesses Tally in an elevated, frantic state. RP 420.

Tally described his frantic effort to get out of the building after the hearing, believing he spoke with his girlfriend without realizing she was not there; and feeling alarmed when he saw White walking from the direction of his car, while staring at Tally and moving his body into a strike like position. RP 272-75.

Tally became hypervigilant when he sensed danger, and he just reacted. Tally's description of his PTSD symptoms logically connected to his inability to form the separate intent to assault, but without an expert, Tally was not entitled to a diminished capacity defense instruction for the jury to consider. RP 273, 275, 277, 280.

Tally testified at trial and at sentencing that he was physically and sexually abused as a child. RP 307, 412. Defense counsel was aware that Tally suffered from PTSD and anxiety and that Tally was triggered by White's aggressive posture while holding a 4 inch piece of metal in his hand. CP 23. Judge Clary rather than counsel recognized that Tally should have presented an expert. RP 420 ("I wish you could have gotten the PTSD into trial. Ideally, you would have had an expert that testified about that or you would have had medical records that came in under a hearsay exception so that the jury could be aware of that.").

In this case, there is no conceivable legitimate tactical reason not to raise a diminished capacity defense. Had defense counsel raised the defense, Judge Clary telegraphed that he would likely have permitted the defense. Accordingly, but for defense counsel's failure to present any expert testimony, the result of the trial would have

been different. This is evident in the jury's reaction to Tally while he was on the stand. Judge Clary commented that after the trial, some of the jurors told him they were afraid while Tally was testifying because he became so animated. RP 417. If the jury had heard a professional explanation, the jury would have had more insight into what was reasonable under the circumstances.

Defense counsel's position that the defense was not diminished capacity and that Tally's personal testimony was adequate to support his defense, constituted prejudicial ineffective assistance of counsel.

Counsel was also ineffective is erroneously believing that the PTSD diagnosis was admissible as a statement made for the purpose of medical treatment. RP 62-63. *Clark* 187 Wn.2d at 651.Under Evidence Rule 803 (a) (4) a statement made for purposes of medical diagnosis or treatment and describing medical history is an exception to the hearsay rule. But, that rule only permits statements made by a patient declarant, not the doctor. Again without an expert, the medical diagnosis was inadmissible under ER 803(a)(4). *Clark*, 187 Wn.2d at 652-53.

Counsel was ineffective and Tally was prejudiced by counsel's

failure to request an expert to present a diminished capacity defense. Tally satisfied both prongs of *Strickland*, because the facts supported a diminished capacity instruction, and if given, the outcome likely would have differed. Strickland, 466 U.S. 668; *Tilton*, 149 Wn.2d at 784. Tally's conviction should be reversed and the matter remanded for a new trial.

### 2. THE TRIAL COURT'S IMPROPER USE OF AN "AGGRESSOR" INSTRUCTION REQUIRES REVERSAL.

Tally was not the first aggressor in the altercation, but the trial court nonetheless gave a first aggressor instruction over the defense's objection. RP 319.

A first aggressor instruction is only appropriate when the record shows that the defendant is involved in wrongful or unlawful conduct before the charged assault occurred. *State v. Douglas*, 128 Wn. App. 555, 562-63, 116 P.2d 1012 (2005). To support a first aggressor instruction the state must offer credible evidence that the defendant provoked the use of force, including provoking an attack that necessitates the defendant's use of force in self-defense. *State v. Riley*, 137 Wn.2d 904, 909-10, 976 P.2d 624 (1999).

Whether sufficient evidence justified a first aggressor

instruction is a question of law reviewed de novo. *State v. Bea*, 162 Wn. App. 570, 577, 254 P.3d 948 (2011). This Court reviews the evidence in the light most favorable to the party requesting the first aggressor instruction. *State v. Fernandez-Medina*, 141 Wn.2d 448, 455-56, 6 P.3d 1150 (2002).

A defendant asserting self-defense must produce some evidence that he or she acted in reasonable apprehension of great bodily harm and imminent danger. *Riley*, 137 Wn.2d at 909. While the defendant need not show he or she was in actual danger, a defendant who provoked the confrontation cannot later claim his actions were in self-defense. *Douglas*, 128 Wn. App. at 562.

At times, conflicting evidence may also support giving the first aggressor instruction, if the provoking act is distinct from the assault. *Bea*, 162 Wn. App. at 577; *State v. Davis*, 119 Wn.2d 657, 665-666, 835 P.3d 1039 (1992). The first aggressor instruction relieves the state of its burden to disprove self-defense; accordingly, the first aggressor "instruction should 'be given only sparingly and carefully, in cases where the theories of the case cannot be sufficiently argued and understood by the jury without such an instruction.'" *Bea,* 162 Wn. App. at 576.

The state argued that it could not argue the theory of its case without the aggressor instruction because the jury needed to know that when someone "goes hands on first" . . . that fundamentally changes the dynamics of how we look at that legally" RP 316. This explanation is clearly erroneous because the aggressive behavior must be an intentional act other than the actual crime*. State v. Kidd,* 57 Wn. App. 95, 100, 786 P.2d 847 (1990).

The facts in *Bower* are similar to Tally's case because in both cases, the defendants felt threatened. In *State v. Brower*, 43 Wn. App. 893, 902-03, 721 P.2d 12 (1986), the appellate court held that the trial court erred in giving a first aggressor instruction because the evidence did not indicate that Brower was involved in wrongful conduct which might have provoked the incident. Brower legally armed himself to retrieve his truck which he believed was going to be stolen. *Brower*, 43 Wn. App.at 895-96. Brower displayed his gun for the first time when the alleged assault occurred, when Martin came down stairs and passed Bower aggressively*. Id*. at 987

Here, like *Brower,* Tally was not involved in any unlawful conduct prior to the alleged assault. Rather, like Brower, White's aggression was intentional and reasonably likely to provoke a

belligerent response. *Brower,* 143 Wn. App. at 896, 902; *Bea*, 162 Wn. App. at 577-78; RP 279.

*Birnel,* is also instructive. In *Birnel*, the trial court erred in giving a first aggressor instruction where the defendant was charged with second degree murder of his wife and he claimed self-defense*. State v. Birnel,* 89 Wn. App. 459, 462, 949 P.2d 433 (1998). On the day of the murder Birnel sat waiting for his wife at the top of the stairs and asked if she was spending their money on drugs. *Birnel,* 89 Wn. App. at 473. The Court of Appeals held that a juror could not reasonably assume the act of sitting on the stairs and asking those questions would provoke a methamphetamine abuser to attack with a knife. *Id.*

Here as in *Birnel*, Tally was not the first aggressor. Rather White raised his shoulder while holding a large metal object in a fight move directed at Tally and Tally reacted. The trial court erred by giving the first aggressor instruction because the first aggressor instruction relieved the state of disproving self-defense where the facts did not support finding that Tally the first aggressor. Accordingly, the error was not harmless. The remedy is to reverse and remand for a new trial. *Birnel,* 89 Wn. App. at 472.

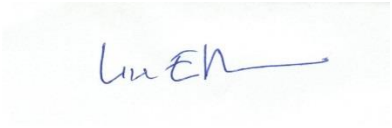
## D. CONCLUSION

Mr. Tally respectfully requests this Court reverse his conviction and remand for a new trial based on ineffective assistance of counsel and denial of his right to a fair trial by the trial court erroneously giving a first aggressor instruction which deprived him of his righto present a defense.

DATED this 31st day of October 2017.

Respectfully submitted,

ERIN SPERGER, WSBA No. 45931
Attorney for Appellant



LISE ELLNER
WSBA No. 20955
Attorney for Appellant

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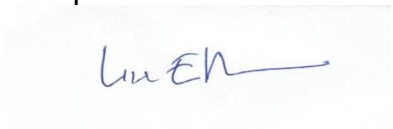

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